



Commonwealth of Kentucky
Finance and Administration Cabinet
OFFICE OF THE SECRETARY
Room 383, Capitol Annex
702 Capital Avenue
Frankfort, KY 40601-3462
(502) 564-4240
Fax (502) 564-6785

Steven L. Beshear
Governor

Jonathan Miller
Secretary

April 2, 2010

No. 10-04

George P. Parker
Parker & O'Connell, PLLC
The Starks Building, Suite 930
455 South Fourth Street
Louisville, KY 40202

RE: Determination of Protest: RFB 143-10 (KSU Center for Families and Children).

Dear Mr. Parker:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Sullivan & Cozart, Inc. ("S&C") to the award of RFB 143-10 - KSU Center for Families and Children (the "RFB"). In the protest you contend that S&C's bid should not have been determined to be non-responsive. For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

The Division of Engineering and Contract Administration, Department For Facilities and Support Services ("DECA") issued the RFB on January 13, 2010. The RFB closed on January 19, 2010. S&C submitted a bid in the amount of \$3,049,600. DECA, in a bid tabulation dated January 19, 2010, determined that S&C's bid was non-responsive. S&C states it was informed that it was determined to be non-responsive because S&C's bid amount was presented in numbers only and was not also written out in words.

By letter dated January 21, 2009 (and filed on January 22, 2010), S&C filed a protest of the award. In its written protest, S&C argues that (1) its bid should not have been rejected as non-responsive because its bid amount was not written in words and (2) its bid should not have been rejected as non-responsive because S&C did not provide an EMR Certificate. On February 4, 2010, DECA provided a written response to the protest.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration Cabinet (the "Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary. KRS 45A.285. S&C was an actual bidder to the RFB so S&C has standing to protest the award.

A protest to an award must be made within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. Here, S&C was determined to be non-responsive on January 19, 2010. The protest was received in the Office of the Secretary on January 22, 2020. The protest was filed within two (2) calendar weeks. The protest, accordingly, is timely.

This procurement was conducted under "competitive sealed bidding" procedures found at KRS 45A.080. Under this process, the contract is to be awarded to the responsive, responsible bidder which offers "best value." A protest to a competitive sealed bid award must show that the award was arbitrary, capricious, or contrary to law. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). Agency decisions are entitled to a presumption of correctness. KRS 45A.280. The protestor, therefore, has the burden to show that the award violates the arbitrary, capricious, or contrary to law standard.

In addition, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) ("[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it."). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Applying these general rules to the specific grounds of protest, the Secretary finds as follows regarding the grounds of protest cited by S&C:

1. S&C's bid should not have been rejected as non-responsive because its bid amount was not written in words.

Regulation FAP 220-05-00 (SUBJECT: BIDDER INSTRUCTIONS FOR CONSTRUCTION SOLICITATIONS) 4(c) provides:

If indicated in the bidding documents, sums shall be expressed in both words and figures.
In the case of discrepancy between the two, the amount in words shall prevail.

S&C admits that it did not provide its bid amount in words. This failure violated FAP 220-05-00 and was a basis for DECA to determine that S&C's bid was non-responsive. S&C alleges, however, that "within the past twelve months, S&C has submitted at least two bids for Commonwealth of Kentucky projects with its lump sum bid amount in numerical form only and in neither case was S&C's bid deemed non-responsive." S&C appears to contend that it was an abuse of discretion not to waive non-compliance with this provision.

The Commonwealth does have the discretion to waive minor irregularities in bids. 200 KAR 5:306 Section 4. While the Commonwealth has the discretion, it does not have the obligation. An exception might be found when an agency so regularly waives an informality so that such waiver becomes the standard practice of the agency. In such a case, it may be an abuse of discretion for the agency not to waive the minor irregularity.

Yet DECA responds as follows: "S&C bid the Land Grant Farm Project, KSU, Frankfort in January 2009. Their bid was ranked ninth out of ten bidders. The buyer did not go through all bid responses for responsiveness, only that of the low-bidder. On January 7, 2010, S&C submitted a bid for EMERGENCY PROCUREMENT Replacement of Barns H, I, J, and T, Ky. Exposition Center. Their bid was third of the four bids submitted. At bid opening, Margaret MacDonald, Branch Manager, informed their representative that the word amounts needed to be completed on their next bid or they would be considered non-responsive."

S&C has not met its burden to show that DECA had established a practice of waiving non-compliance with FAP 220-05-00 4(c). DECA correctly determined that S&C's bid was non-responsive for failing to write out its bid amount in words. This ground of protest, therefore, is without merit.

2. S&C's bid should not have been rejected as non-responsive because S&C did not provide an EMR Certificate.

For its second ground of protest, S&C asserts that it determined to have submitted a non-responsive bid because it did not submit an EMR certificate. DECA states that this was not a cause for bid rejection. DECA states:

S&C's bid was not rejected due to their failure to include the EMR certificate. They were ruled non-responsive for failure to complete the bid documents. The e-mail sent to S&C stated, "I wanted to let you know that I did not receive the EMR certificate with the bid. In the future, you will want to make sure that you have that worksheet from your worker's comp carrier as it could (and would have) made a difference on who the successful bidder is. It will be the NCCI or KY AGC worksheet (or possibly another depending on who your coverage is through)," This was sent as a courtesy for future bids. With the best value scoring methods in place, the additional points given for the EMR score could play a role in who will be the successful bidder.

This ground of protest is without merit.

Accordingly, upon review of the record, S&C has failed to overcome the presumption of correctness provided by KRS 45A.280. The protest, therefore, must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by Finance Cabinet shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation



Robin Kinney
Executive Director
Office of Administrative Services

cc: Amanda Greer, DECA
Paul Gannoe, DECA